Supreme Court, U. S.
F I L E D
DEC 2 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-502

NANCY GAYLE SMART, *Petitioner*,

v.

CLARENCE JONES, ET AL, *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

HENRY WADE
Criminal District Attorney
Dallas County, Texas

JOHN B. TOLLE
Assistant District Attorney
Dallas County Courthouse
Dallas, Texas 75202
(214) 749-8511

Attorneys for Respondents

INDEX

	Page
Table of authorities	ii
Opinion below	1
Jurisdiction	2
Statutes involved	2
Questions presented	3
Statement of the case	4
Statement of the facts	4
ARGUMENT:	
I. The District Court and the Court of Appeals properly followed the settled state law	6
II. Petitioner was not deprived of a fair trial or prejudiced in any way because the District Attorney represented the respondents at the trial of this cause	12
Conclusion	12
Certificate of service	14
Appendix: Text of Texas Attorney General's Opinion No. C-164	15

CASES

	Page
Ada Oil Co. v Dillaberry, 440 SW 2d 902 (1969)	11
Beck v. Ohio, 379 US 89, 85 S.Ct.223, 13 L.Ed.2d 142 (1964)	6
Fletcher v. State, 298 SW 2d 581 (1957)	8
Henderson v. State, 422 SW 2d 175 (1967)	6
Henry v. United States, 361 US 98, 80 S.Ct.168, 4 L.Ed.2d 134 (1959)	6
Klingler v. United States, 409 F.2d 299 (8th Cir. 1969)	8
Lerma v. State, 491 SW 2d 152 (1973)	6
Merriweather v. State, 501 SW 2d 887 (1973)	7
Miller v. State, 442 SW 2d 340 (1969)	7,9
Muggley v. State, 473 SW 2d 470 (1971)	7,9
Rodriguez v. State, 172 SW 2d 502 (1943)	6
Smart v. Jones, 493 F.2d 663; 495 F.2d 1372 (5th Cir. 1974)	1,4
Terry v. Ohio, 392 US 1, 88 S.Ct.1868, 20 L.Ed.2d 889 (1968)	8
United States v. Saunders, 476 F.2d 5 (5th cir. 1973)	8
Weeks v. State, 417 SW 2d 716 (1967)	7,9
Whiteley v. Warden, Wyoming State Penitentiary, 401 US 506, 91 S.Ct.1031, 28 L.Ed.2d 306 (1971)	7
Witherspoon v. State, 61 SW 396 (1901)	9

Page

STATUTES

Vernon's Annotated Civil Statutes, Art. 6701(d)
Sec. 51(a) 2,8
Sec. 153 2,8
Vernon's Annotated Code of Criminal Procedure,
Art. 14.01 2,8

MISCELLANEOUS

54 C.J.S. *Malicious Prosecution*, Secs. 48-53 11
Attorney General of Texas, Opinion C-164 10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-502

NANCY GAYLE SMART, *Petitioner,*

v.

CLARENCE JONES, ET AL, *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

This brief in opposition to the petition for certiorari in this cause is respectfully submitted on behalf of the respondents Clarence Jones, Sheriff of Dallas County, Texas, and J. W. Grandstaff, Gail Barrett and Benny Barrett, Deputy Sheriffs of Dallas County, Texas.

OPINION BELOW

This case was affirmed without opinion by the United States Court of Appeals for the Fifth Circuit, and its decisions are now reported: *Smart v. Jones,* 493 F.2d 663 (panel decision); 495 F.2d 1372 (rehearing en banc denied).

JURISDICTION

The jurisdictional basis is adequately stated in the petition.

STATUTES INVOLVED

Following are the Texas statutes involved in this case:

1.) *Vernon's Annotated Code of Criminal Procedure,* Article 14.01 (Vol. 1, 1974-1975 pocket part, p. 201):

Art. 14.01

(a) A peace officer or any other person, may, without a warrant, arrest an offender when the offense is committed in his presence or within his view, if the offense is one classed as a felony or as an offense against the public peace.

(b) A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view.

2.) *Vernon's Annotated Civil Statutes,* Article 6701(d), the Uniform Act Regulating Traffic on Highways, in pertinent part:

Sec. 51 (Vol. 19½, 1974-1975 Pamphlet Supplement, p. 166)

(a) Any person who drives any vehicle in willful or wanton disregard for the safety of persons or property is guilty of reckless driving.

Sec. 153 (Vol. 19½, p. 437)

Any peace officer is authorized to arrest without

warrant any person found committing a violation of any provision of this Act.

QUESTIONS PRESENTED

All four of petitioner's "Questions Presented" are seriously and materially misleading:

1.) It is simply untrue that, as petitioner's Question No. 1 implies, the District Court and the Court of Appeals failed to follow the settled state law.

2.) It is also simply untrue that, as petitioner's Question No. 2 implies, the decision by the Court of Appeals made any change whatever in the existing state law.

3.) It is again simply untrue that, as petitioner's Question No. 3 implies, petitioner was deprived of a fair trial or in any way prejudiced by the fact that the respondents were represented by the District Attorney at the trial of this case in the District Court. The record conclusively shows that the criminal charges against petitioner were dismissed six months prior to the trial of this case, and petitioner's complaint in this regard is based on sheer conjecture and speculation.

4.) Finally, it is simply untrue that, as petitioner's Question No. 4 implies, it was or is established that any sort of permanent record of petitioner's arrest, on computer or otherwise, was made. The record contains not a scintilla of evidence on this point.

Hence, particularly as to each and all of petitioner's asserted questions, as well as otherwise, no novel or important question at all is presented by this case.

STATEMENT OF THE CASE

Petitioner's statement of the case, and her discussion of cited Texas decisions, are replete with serious, material misstatements and omissions, and thus are badly misleading – all of which we attribute to partisan zeal, but which we must of course correct. We therefore here restate the case and its facts, with appropriate citations to the Appendix and Transcript of testimony before the Court of Appeals.

The cause arose as a civil rights complaint by petitioner, alleging that respondents had violated her civil rights under 42 USC Secs. 1983, 1985, 1986 and 1988 (A.1). Petitioner did not seek recovery, by pendent jurisdiction, under Texas law. Petitioner alleged that respondents had falsely arrested her without probable cause, had filed false criminal charges against her, and had entered into a conspiracy to injure and harrass her by filing imaginary charges, making arrests, and incarcerating and stamping her with a criminal record. (A. 2-7) The case was tried twice before different juries, the first trial ending in a hung jury on October 1, 1973. (A. iii) The second trial began on October 11, 1973, and the jury returned a verdict for respondents on October 15, 1973. (A. iv) From the judgment entered on the verdict, petitioner appealed to the United States Court of Appeals for the Fifth Circuit. The Circuit Court affirmed without opinion and denied rehearing en banc. *Smart v. Jones*, 493 F.2d 663 and 495 F.2d 1372.

STATEMENT OF THE FACTS

Testimony as to the facts of the case was in sharp dispute.

Deputy Sheriff Grandstaff testified that he went to the residence of one Don Smart in the City of Dallas for the purpose of serving Don Smart with a notice of a condemnation hearing. (A. 39-41) There he encountered Nancy Gayle Smart, the petitioner, to whom he announced his identity and purpose. (A. 43) Petitioner told him that "she didn't give a damn" who he was, to get off the property. (A. 43) Petitioner went into the house and came out in a few minutes with Don Smart. (A. 43) Don Smart got into one of the cars parked by the house and drove across the lawn to get around Grandstaff's car. Grandstaff followed in his car, intending to serve the condemnation notice. (A. 44) Petitioner followed in another car. During the course of the drive along the public streets of Dallas, petitioner recklessly and deliberately tried many times to force Grandstaff's car to the curb, and finally succeeded in doing so. (A. 46) Grandstaff called for assistance over his police radio. (A. 50-51) Other deputy sheriffs, responding to Grandstaff's radio calls, arrested petitioner a few minutes and a few blocks from the spot where she had forced Grandstaff to the curb. The deputy sheriffs prepared reports of the facts and presented them to Assistant District Attorney H. L. Brotherton, who filed the charges complained of by petitioner. (Transcript, pp. 79-80) Petitioner testified that she did not force Grandstaff to the curb, but that Grandstaff actually swung his car violently in front of hers and blocked the path of both herself and of Don Smart. (Transcript, p. 144) The jury made its credibility choices and found in favor of Grandstaff and the other defendants.

ARGUMENT

I.

THE DISTRICT COURT AND THE COURT OF APPEALS PROPERLY FOLLOWED THE SETTLED STATE LAW.

Notwithstanding petitioner's strident contentions, the record conclusively shows that the District Court and the Court of Appeals properly followed and applied the settled state law.

1.) It is well-settled in Texas, as in most jurisdictions, that:

> "The question of whether probable cause exists at the time of the arrest (or search) can only be decided by the concrete factual situation presented by each individual case —."
>
> *Lerma v. State*, 491 SW 2d 152, 154 (1973), citing *Beck v. Ohio*, 379 US 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964), and *Henry v. U.S.*, 361 US 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959).

It is thus apparent that petitioner's reliance on the decision in *Rodriguez v. State*, 172 SW 2d 502 (1943) is misplaced, because the "concrete factual situation" presented by *Rodriguez* bears not the slightest resemblance to the facts presented by this case.

2.) It is further well-settled in Texas, contrary to petitioner's contentions, that probable cause is enough to justify an arrest for a misdemeanor, even when the person arrested is not actually guilty of an offense. *Henderson v. State*, 422 SW 2d 175, cert. den. 90 S.Ct. 1709, 398 US 912, 26 L.Ed.2d 73.

3.) The test of probable cause is the same in Texas as in most jurisdictions:

> "— whether, at the moment of arrest, the facts and circumstances within the knowledge of the arresting officer and of which he has reasonably trustworthy information would warrant a reasonable and prudent man in believing that a particular person has committed or is committing a crime."

Lerma v. State, supra, p. 154.

4.) It is again well-settled in Texas that if an officer who initiates a request for an arrest is in possession of sufficient knowledge to constitute probable cause, he need transmit to the arresting officer only such information as is necessary for the arresting officer to know who is wanted. *Weeks v. State*, 417 SW 2d 716. The test as to probable cause for arrest in such a situation is the information known to the officer who requests the other officer to effect the arrest. *Miller v. State*, 442 SW 2d 340; *Merriweather v. State*, 501 SW 2d 887. An arresting officer who does not himself possess probable cause for arrest has the right to act upon the basis of a police radio broadcast requesting arrest and is entitled to assume that the officer who requests the arrest has sufficient probable cause to justify it. *Muggley v. State*, 473 SW 2d 470. This is the rule announced by this Court in *Whiteley v. Warden, Wyoming State Penitentiary*, 401 US 560, 568, 91 S.Ct. 1031, 1037, 28 L.Ed.2d 306 (1971).

5.) Again contrary to petitioner's contentions, The Texas law is that probable cause for arrest is determined by objective facts, and the arresting officer's subjective opinion is not material, and that, where the objective facts show that an officer had probable cause to arrest for one misdemeanor

(drunkenness), the fact that the officer relied upon another misdemeanor offense for which he had no probable cause to arrest (driving while intoxicated), did not vitiate the arrest. *Fletcher v. State*, 298 SW 2d 581. This is, of course, the same standard announced by this Court and by the Courts of Appeal. *Terry v. Ohio*, 392 US 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *Klingler v. United States*, 409 F.2d 299 (8th Cir. 1969); *United States v. Saunders*, 476 F.2d 5 (5th Cir. 1973).

Applying the foregoing well-settled legal principles to facts of this case, it is at once apparent that petitioner's arrest by the respondent deputy sheriffs was lawful. When petitioner drove her car in the manner described by Grandstaff, recklessly and deliberately forcing his car to the curb on a public street, Grandstaff had ample probable cause to believe that petitioner was guilty of the offense of reckless driving in violation of Art. 6701(d), Sec. 51, V.A.C.S., and was authorized to arrest her without a warrant by virtue of the provisions of Art. 6701(d), Sec. 153. He also had such authority to arrest by virtue of the provisions of Art. 14.01(a) and (b) of the Texas Code of Criminal Procedure. It should be noted here that the testimony showed that Grandstaff intended to arrest Don Smart also after petitioner curbed Grandstaff's car, because Don Smart had operated his car in such a reckless manner during the time that they were proceeding on the public streets that Grandstaff had almost collided with Don Smart's car. (Transcript, p. 306) Since it was impossible for Grandstaff to follow two cars going in different directions, it was perfectly reasonable for him to radio for assistance. Since the facts and circumstances known to Grandstaff, when judged by an

objective standard, furnished him with ample probable cause to arrest petitioner, the arrest, which was effected by other deputies who were responding to Grandstaff's radio calls, was lawful. *Weeks v. State*, 417 SW 2d 716; *Miller v. State*, 442 F.2d 340; *Muggley v. State*, 473 SW 2d 470. Contrary to petitioner's contentions, the foregoing legal principles have the same application to misdemeanor offenses as they do to felony offenses.

Further contrary to petitioner's contentions, the Courts below did not make any change in the Texas law concerning the nature of a notice of a condemnation hearing. Petitioner argues at length that such a notice is not "civil process", and cites the appropriate Civil Rule and analagous civil cases from the Texas appellate courts in support of her contention. But petitioner fails to note that, in criminal prosecutions, the Texas Court of Criminal Appeals holds that a different rule applies, and that the process which will support a criminal prosecution is process which is fair on its face, and defines such as:

> "— that process may be said to be fair on its face which proceeds from a Court, magistrate, or *body having authority to issue process of that nature — . The word 'process' is made use of in this rule in a very comprehensive sense —.*" (Emphasis added.)
>
> *Witherspoon v. State*, 61 SW 396, at 398.

Petitioner does not seriously assert that the condemnation commissioners were not a "body having authority to issue" a notice of a condemnation hearing; indeed, the opposite is conclusively shown from the record and from the authorities cited by petitioner. The inescapable conclusion is that

the notice of the condemnation hearing which Grandstaff was endeavoring to serve on Don Smart was a "civil process" as far as the Texas criminal law is concerned, and that Grandstaff had probable cause to believe that petitioner was guilty of interfering with the service of it.

Petitioner next argues that the Sheriff and his deputies had no authority to serve such a notice of a condemnation hearing, and cites as authority an opinion by the Attorney General of Texas. (Petition, p. 12). Quoting only a small portion of such opinion, petitioner asserts that the same stands for the proposition that the Sheriff may not serve a notice of a condemnation hearing. We have reproduced in full in the Appendix to this brief the Opinion in question, so that the Court may see how misleading petitioner's isolated quotation is. A fair reading of the opinion shows that it concerns how and when various costs are taxed and collected in a condemnation proceeding, and it specifically states that, if the Sheriff does serve notices in a condemnation hearing, he should collect his costs through the proceeding and not through the clerk. (Opinion, p. 15, Item *J*)

We do not understand how petitioner can say that this opinion is any authority whatever for her contention that the Sheriff was without authority to serve such notice; and no Texas court has ever so held.

What we have said immediately above concerning the definition of "civil process" which will support a criminal prosecution in Texas, as well as the right of the Sheriff to serve a notice of a condemnation hearing, is intended to

correct what we feel are errors of law and of fact in the petition; the most important point in this case is that the questions as to whether or not the Sheriff and his deputies were authorized to serve the notice of a condemnation hearing, and whether or not such notice was a "civil process" for the purpose of a criminal prosecution, were not controlling issues in the trial or appeal, and are not the controlling issues here. The reason that they are not controlling is because the respondent deputies arrested petitioner for her *conduct* in forcing Grandstaff's car to the curb while he was driving on a public street; the deputies then made full reports of the *facts* and presented the same to Assistant District Attorney Brotherton, and it was Brotherton, not the deputy sheriffs, who selected the charges to be filed and who filed such charges by information. (Transcript, 77-81; A. 88-90, 92-95) Having thus made a full and fair disclosure to the Assistant District Attorney of all of the *facts*, the respondents could not be held liable for any errors that the latter may have committed in selecting and filing charges based on those facts. This is the well-settled Texas law, as well as the prevailing law throughout the country *Ada Oil Co. v. Dillaberry*, 440 SW 2d 902; 54 C.J.S. *Malicious Prosecution*, Secs. 48(b) – 53. Thus all of petitioner's extended arguments concerning the charges against her were and are not relevant to her claim against the respondents. It is not correct to say (as does the petition, p. 4) that charges were filed against petitioner in a "non-attorney justice of the peace court –." The record conclusively shows that the only charges filed against petitioner were filed by the Assistant District Attorney, who presented the same by information, as shown above.

II.

PETITIONER WAS NOT DEPRIVED OF A FAIR TRIAL OR PREJUDICED IN ANY WAY BECAUSE THE DISTRICT ATTORNEY REPRESENTED RESPONDENTS AT THE TRIAL OF THIS CAUSE.

As we have stated above, petitioner's claim in this regard is based entirely upon conjecture and speculation, and there is no basis in the record to support it. It is completely false to say (as does the petition, p. 6), that petitioner protested at "all times before the trial and appellate courts" the District Attorney's representation of respondents in this case (as the state law requires him to do.) The truth of the matter is that petitioner did not raise any protest whatever from the time that the answer was served on November 28, 1972, until October 9, 1973, (A. 36) a date some eight days after the first trial had ended in a hung jury, and less than two full days before the case was set for re-trial on October 11, 1973. It should also be noted that the criminal charges against petitioner had been dismissed in April, 1973, some six months prior to the trial of this case, and petitioner's complaint that she was being prosecuted at the same time that this case was tried is untrue.

CONCLUSION

The record in this case reflects that the lower courts properly followed and applied the state law and did not make any purported changes in it; that petitioner was not prejudiced by the fact that the District Attorney represented the respondents in the trial of this case; and that petitioner has no standing to complain about the failure to

order expungement of her record, as no such record has been shown to have been made.

WHEREFORE, respondents pray that the writ of certiorari be denied.

Henry Wade

HENRY WADE
Criminal District Attorney
Dallas County, Texas

John B. Tolle

JOHN B. TOLLE
Assistant District Attorney
Dallas County Courthouse
Dallas, Texas 75202
Attorneys for Respondents

CERTIFICATE OF SERVICE

I, John B. Tolle, a member of the Bar of the Supreme Court of the United States, do hereby certify that I have served copies of the foregoing Brief in Opposition to Petition for Certiorari on counsel for Petitioner, by depositing the same in the United States Mail, first-class postage prepaid, on this the 27 day of November, 1974, addressed to S. L. Lewis, Esq., 5614 Richmond Street, Dallas, Texas 75206; and to Don M. Smart, 10611 Garland Road, Dallas, Texas 75218, as counsel of record for Petitioner.

John B. Tolle

JOHN B. TOLLE

APPENDIX

THE ATTORNEY GENERAL OF TEXAS

Austin 11, Texas

October 17, 1963

Honorable Henry Wade
Criminal District Attorney
Dallas County
Dallas, Texas

Opinion No. C-164
Re: Proper items of court costs and costs in condemnation proceedings.

Dear Mr. Wade:

We have your letter in which you request an opinion pertaining to proper items of court costs and costs in condemnation proceedings.

You enclose a copy of a Bill of Cost in a condemnation suit containing fees for the County Clerk, Sheriff and County Judge, which items you have marked "A — L" inclusive and are as follows:

A — Taxing cost	.50
B — Filing and Docketing	1.00
C — Recording Notice of Lis Pendens	2.00
D — Filing four notices	1.00
E — Filing one notice	.25
F — Filing intervention of County	.25
G — Award of Special Commissioners	.25
H — Order to withdraw funds	1.25
I — Judgment	8.00

The above items A — I are for the County Clerk.

J — Sheriff fees for serving notices	16.00
K — County Judge fee	3.00
L — County Law Library fund	1.50

Honorable Henry Wade, Page 2 (Opinion No. C-164)

You submit the following questions:

"1. Which of the items listed are proper Court costs?

"2. Which of the items listed are costs of the proceeding?

"3. If any of the items listed are held to be not included in either (1) or (2) above, can the office holder performing the service be legally reimbursed for the work done as services rendered?"

You state that in view of our Opinion No. WW-1008 dated March 7, 1961, it appears to you that Items *G*, *H*, and *I* are proper court costs; that under Articles 6640 and 6641, V.A.C.S., Item *C* appears to be a proper item of cost; that under Article 3912e, it appears that Items *A*, *B*, *D*, *E*, *J*, and *K* are costs of the proceeding; and that Item *L* appears to be neither a cost of a proceeding nor a court cost. You do not express an opinion as to Item *F*.

It appears to us that our Opinion No. WW-1008 answers all the questions propounded by you and we shall briefly review that opinion, the pertinent parts of which are substantially as follows:

1. The Petition or Statement of Condemnation is filed with the County Judge who appoints the Commissioners. (Article 3264, Sec. 2). Neither the Judge, Clerk, nor Sheriff has anything whatever to do with the proceeding thereafter until the Commissioners file their award or decision with the Judge as provided by Article 3265(5).

2. If no objections to the award are filed, then the only fees of office that any officer can collect are those by the Clerk who is entitled to three fees in the amount allowed by law for (1) filing the decision or award,

(2) for recording the award, and (3) for recording the judgment which the County Judge has made by making the award the judgment of the court. These are the only fees of office that can be charged by any officer if no objections to the award are filed. If a Lis Pendens Notice is filed the Clerk will collect the fee provided by law, not as court costs nor as costs of the proceeding, but as a fee for filing and recording instruments.

3. If the condemnor does not pay the damages directly to the condemnee, but pays same into court as provided by Art. 3268(1), and the money is withdrawn by the condemnee, there is no fee to be collected by any officer. The money is not withdrawn by an order of the court, but only by an order of the condemnee. There is no provision in law for paying the Clerk any compensation for this service.

4. If objections to the award are filed, then the proceeding become a civil cause as provided by Art. 3266(6), and the officers are allowed to charge the regular fees allowed by law for services in a civil cause. If the Clerk is required to issue citations, he is authorized to charge a fee allowed by law for such service. If the Sheriff or Constable is required to serve citations, he is authorized to collect the fees allowed by law for such service. This is the first time that the Sheriff has anything to do with the condemnation proceeding. If objections are filed, the cause becomes a civil cause, and the Judge is allowed to collect the fee provided by law for each civil case.

FIRST AND SECOND QUESTIONS

We believe that the first two questions propounded by you may better be answered by giving our opinion as to each item mentioned by you as follows:

Items A and B are proper court costs for the Clerk only if objections to the award or decision are filed and the Clerk

sets up the proceeding as a civil cause. If no objections to the award are filed, then such items are not a proper charge in any case.

Item C is not a proper item of court costs or costs of the proceeding. The party filing a Lis Pendens Notice, even if Honorable Henry Wade, Page 4 (Opinion No. C-164) the State or County, under Art. 3219e, V.C.E., is now required to pay the recording and filing fee to the Clerk.

Items D, E, and F are not proper items of court costs or costs of the proceeding. These are services to be performed by the Commissioners who are paid for all services as provided by Art. 3266(3), V.C.S. *Item F* is a proper item of court costs if the intervention is filed after objections to the award are filed.

Item G is a proper item of costs in every case. In addition to this, the Clerk is, in every case, entitled to a fee for recording the award if that is done. If the judgment and award are combined in one instrument, then only one fee is charged.

Item H is not a proper item of court costs or costs of the proceeding. The law does not make any provision for any fee for such service even if the money is handled by the Clerk.

Item I is a proper item of costs in every case. However, we cannot say that the amount of $8.00 set out is a proper amount. Art. 3930, V.C.S., sets the *amount* of the fee.

Item J is not a proper item of court costs. It is a proper item of costs of the proceeding. Under Art. 3264(6), V.C.S., the notices may be served by any person competent to

testify. If the Sheriff performs this service he should collect his compensation through the proceeding and not through the Clerk.

Items K and L are proper items of court costs only if objections to the award are filed and if the proceeding becomes a civil cause. If no objections are filed, the County Judge does not receive any compensation whatever and no library fee is charged.

THIRD QUESTION

You quote Section 1 of Article 3912e, V.C.S., and underline and emphasize the last clause or proviso of said Article as follows:

> "Section 1. No district officer shall be paid by the State of Texas any fees or commissions for any service performed by him; nor shall the State or any county pay to any county officer in any county containing a population of twenty thousand (20,000) inhabitants or more according to the last preceding Federal Census any fee or commission for any service by him performed as such officer; provided, however, that the assessor and collector of taxes shall continue to collect and retain for the benefit of the Officers' Salary Fund or funds hereinafter provided for, all fees and commissions which he is authorized under law to collect; and it shall be his duty to account for and to pay all such moneys received by him into the fund or funds created and provided for under the provisions of this Act; provided further, that the provisions of this Section shall not affect the payment of costs in civil cases or eminent domain proceedings by the State, but all such costs so paid shall be accounted for by the officers collecting the same, as they are required under the provisions of this Act, to account for fees, commissions and

> *that the provisions of this Section shall not affect the payment of fees and commissions by the State or County for services rendered by County Officers in connection with the acquisition of rights of way for public roads or highways, and provided that such fees and commissions shall be deposited into the Officers' Salary Fund of the County by the County Officer collecting such fee. As amended Acts 1959, 56th Leg., p. 35, ch. 23, § 1."*

Prior to the amendment of 1959, Article 3912e prohibited the payment of compensation to district and county officers for any services performed by such officers for the State or County in condemnation proceedings (other than civil causes) or such services as filing and recording instruments (such as Lis Pendens) and furnishing certified copies of instruments.

After quoting the above provision, you make the following statement pertaining to it:

Honorable Henry Wade, Page 6 (Opinion No. C-164)

> "It is clear that Section 1, Article 3912e, V.A.C.S., intends for County officers to be reimbursed for all services rendered in connection with the acquisition of rights of ways for public roads or highways. Therefore, if the above listed items are held to not be Court costs or costs of the proceeding, they are surely reimbursable as services rendered under the above statute."

We do not agree with your interpretation of Article 3912e as above quoted. We believe that it is clear that the amendment to Article 3912e was only to allow officers to collect the fees allowed by law for any services in connection with condemnation suits which they were not allowed to collect before the amendment, and that said amendment was not intended to allow the officers to collect for a service that

they are *not required to render*, or any compensation for any service they *are required to render* for which no compensation is provided by law. See the authorities cited in Opinion No. WW-1008.

The fact that an officer might for convenience do some of the work required of the Judge or Commissioners appointed by him does not authorize the payment of compensation not provided by law. In order to receive compensation, the service rendered by the officer must be required of him and in addition thereto the law must provide for payment of same.

We believe that this sufficiently answers your third question.

SUMMARY

This opinion pertains to the fees or compensation of officers for services in eminent domain proceedings.

Yours very truly,

WAGGONER CARR
Attorney General of Texas

H. GRADY CHANDLER
Assistant

HGC/jp

Honorable Henry Wade, Page 7 (Opinion No. C-164)

APPROVED:

OPINION COMMITTEE
W. V. Geppert, *Chairman*

J. C. Davis
Malcolm Quick
William Osborne
Leslie King

REVIEWED FOR THE ATTORNEY GENERAL
By: Stanton Stone